IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 125

GENERAL PLYWOOD CORPORATION,
Petitioner,
v.
UNITED STATES PLYWOOD CORPORATION,
Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Seeks to Raise Irrelevant Fact Issues

The brief for respondent supports its argument that the Petition of General Plywood asks for a review of adverse findings of fact, by stressing at length what is said to be evidence that the belts used in the accused processes are "abrasive" because they remove wood, create clouds of dust, etc. At the trial, United States Plywood devoted considerable time to demonstrations that wood could be removed by 10/0 belts if used in various ways, usually

quite unlike the accused processes. However, the proper test is not whether the belts are abrasive in an absolute sense, but rather, how does their degree of abrasiveness compare with that of the cork belt which is described in the patent as the preferred rubbing medium and as being "relatively nonabrasive".

The Petition is based on *admissions* of United States Plywood that *the belts as used in the accused process are no more abrasive than the cork belt.*[1] No denial of this basic proposition appears in the United States Plywood "Brief in Opposition". Nor does that brief point out any respect in which the manipulative steps of the accused processes differ from those claimed in the patent in suit.

Much of the remainder of the brief in opposition is directed to alleged differences (other than abrasiveness) between the belts used in the accused process and those described in the patent. To the extent, if any, that these contentions support the erroneous judgment of non-infringement of a process because of differences in the *equipment* used, they concede the basis for the petition: namely, tha. the judgment was based on an error of law. To the extent that they deal with the charactertistics of the rubbing medium defined in the claims of the patent, they fail utterly to cite any evidence that the specified characteristics were lacking in the belts as used in the accused processes.

The assertion that the accused belts are neither yielding nor heat insulating is based solely on reference to the character of the individual pieces of grit, which are almost too small to be seen by the naked eye and are partially imbedded in a glue layer. The belt as a whole (which is

[1] Petition, No. 125 of October Term 1967, pp. 13-16.

normally 50 inches wide and over 8 feet long) is "yielding" because it is flexible and is admittedly pressed against the work by a soft rubber cover on the drum.[2] It is heat insulating "in comparison with metal" as stated in the patent (R3058a, col. 3, lines 24-27), because it is made up of paper or cloth, glue, and packed wood dust, all good heat insulators.[3] There is no requirement in the patent that the belt be non-metallic and no evidence that any portion of the belts used by U.S. Plywood is metallic.

Densification

The patented process densifies the wood surface and that same result is achieved in the accused processes. No holding to the contrary was made by the Courts below, probably because of the overwhelmnig evidence that the results obtained in the accused processes were identical to those obtained by the preferred practice of the process described in the patent. In the Petition, General Plywood merely pointed, because of its conclusiveness, to the admission of United States Plywood that its "Micro-Fine"

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[2] U.S. Plywood uses a soft (30 or 40 durometer) rubber covered roll in every one of its accused operations as contrasted with the much harder (60 durometer) rolls used by U.S. Plywood for *sanding* (See DX2083A and B, R3559a-60a, 1526a; Admissions 133-135 and 141-143 by USP, R3524a-5a and 3528a, 1447a) U.S. Plywood confirmed the purpose of the adoption of the soft roll: "We have a softer durometer roll that is used in conjunction with the machines that has the 10/0 paper so that its function is to *follow any inaccuracy in* the panel and not do any actual cutting" (USP's Back, R310a). This is exactly the type of "yielding" contemplated by the patent.

[3] Van Ormer, R1870a-1a, 1887a-8a; Fishleigh, R1416a, 1568a-9a.

process produced a wood surface of reduced porosity[4] but there is a great mass of unimpeached supporting evidence, including the results of *inter partes* tests.[5]

In an attempt to create an issue of fact as to the existence of a densified surface layer, the brief in opposition to the Petition grossly misrepresents the evidence and cites testimony which was demolished on cross-examination of the very witnesses relied upon and which is overwhelmingly

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[4] Petition, No. 125 of October Term, 1967, pp. 12 and 13.

[5] The reduction in porosity, deriving from the densification of the surface, results in one of the principle advantages of the process which led to its adoption by both parties: finishing materials, including lacquer, are absorbed much more uniformly and to a much lesser degree than where the surface is prepared for finishing solely by sanding the surface. That the accused processes benefit from this advantage is not only admitted but is proclaimed by U.S. Plywood (Adm. 77 by USP, R3493a-4a, 1447a). This unique advantageous characteristic of the process was noted not only when the process was first disclosed by General Plywood to U.S. Plywood (Adm. 41 by USP, R3468a, 1447a) and not only when 3M conducted tests of the process with cork belts and with 10/0 belts (DX 3M162, R2814a, 437a), but also when U.S. Plywood tried out the suggested process in its plant for the very first time (Adm. 64 by USP, R3487a, 1447a). See also, USP's witness Oeffinger, R960a, Baker, R450a-1a, 501a, Day, R670a, and Hemming R736a. The confirmatory *inter partes* tests, illustrating the fundamental difference, in this characteristic, between the accused and patented processes on the one hand and the finest of sanding on the other hand are summarized in DX 2093, R3568a, 1575a, and by Fishleigh, R1575a-82a, 1601a-3a).

shown to be erroneous.[6] The subsidiary assertion that in the accused processes the wood is not heated sufficiently to soften is based on a gross misrepresentation of the evidence. The temperature at which wood softens was established by U.S. Plywood's own witnesses (R546a, 523a-4a, 671a) and the temperature test relied on in U.S. Plywood's brief was wholly discredited by the very witness who performed it (R685a-6a, and see R1635a-44a, 1658a-64a). U.S. Plywood's assertion (p. 12) that "only 2 or 3 isolated instances" of scorching have occurred in the accused operations "in 7 years of operations. (584a)" is flatly false. See USP's McCormick, R582a-3a, 585a; Back R334a; Baldwin, R2185a; Suard, R1150a-1a; and Day, R2312a, and see Admissions 62, 64 and 74, R3483a, 3486a, 3492a, 1447a.

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[6] The other "evidence" relied upon by U.S. Plywood in its effort to lead this court to believe that there is a fact issue on "densification" was equally nonexistent. The alleged photomicrographic evidence was not even deemed worthy of printing by USP in the approximately 4000 page joint appendix, and the witness relied on by USP admitted he had no knowledge of the preparation of the photographed samples (R536a-7a) and even more importantly he admitted that the photographs were inconclusive (R546a, 554a-5a, 558a-67a). The alleged density measurement tests were admittedly based on an assumption which was wholly erroneous (Day, R667a, 670a, 657a-8a, 661a, and 669a). The allegation (p. 9) that fine sanding reduced porosity is not only flatly incorrect but is supported solely by reference to certain oil absorption tests made in behalf of U.S. Plywood which were not even printed and which established, by the admission of the testifying witness, that the porosity of the wood surfaces produced in the accused operation was *essentially the same* as that of an *admittedly densified* wood surface (Dietz, R555a-7a and 564a-5a).

The False Claim That the "Accused Processes Use Only the Prior Art"

The fact that 10/0 sandpaper is old and that wide belt machines are old does not mean that the microseal process of the patent in suit is old, particularly since, in the prior art, sandpaper was used only for sanding, which is admittedly only a cutting action (DX 2055, R3437a-41a, 1447a). Moreover, there is no evidence that 10/0 grit belts were ever used on a wide belt machine for any wood treatting operation prior to Alexander's invention of the microseal process in 1954.

The instructions supplied to purchasers of wide belt machines did not suggest the use of relatively non-abrasive belts at high pressures on wood, and the practice of experts in the woodworking industry was to use the coarsest possible grit for sanding wood[7] and to use lighter pressures for the finer grits.[8] The advertisements of the Timesaver machine, one of which was dated more than a year prior to the filing of the Alexander application, deal with wood sanding only. This is made clear if the sentence partially quoted in respondents brief is quoted in full. The sentence reads:

> "Grits as fine as 9/0 can be used successfully and due to the cleaning action of the serrated rubber drum will not fill up". (R2851a)

It is evident from the statement that the belt "will not fill up" that the operation described is a simple sanding operation. Mr. Pendergast, who owned Timesaver, Inc., and approved the text of this advertisement, later learned of the

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[7] Baker, R490; Fishleigh, R1539a-40a, 1718a.

[8] Van Ormer, R1865a; Fishleigh, R1540a.

microseal process and characterized it as "revolutionary" and "truly sensational".[9]

U.S. Plywood repeatedly seeks to equate the accused processes with the worn 2/0 grit process disclosed by the prior art McDonald patent (3070a). This ignores the admission by U.S. Plywood that it was not using the McDonald process (Hemming, R687a and 734a) and the undisputed evidence that McDonald's process was grossly more abrasive than any accused process.[10]

The Patented Process Represents a "Substantial Advance in the Art"

U.S. Plywood's attempted refutation of the holdings of both courts that the process does represent a substantial advance in the art rests at its essence on the proposition (p. 25) that the patented process merely adapted a "known metal polishing process to wood polishing" and on the proposition (p. 24) that the machine and belt were old. The former proposition is wholly false: the alleged "known metal polishing process" was a single experiment which was a complete failure and which was never revived (DX

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[9] DX (TS) 247, R2862a-3a, 896a.

[10] U.S. Plywood's test (PX 1006, R2908a-9a, 254a-5a) of one of its accused processes showed that the amount of wood removed was a very small fraction of that removed by 6/0 sandpaper, which is finer than any used commercially by U.S. Plywood prior to being introduced to the microseal process. That amount is correspondingly tiny in comparison with the amount removed using McDonald's worn coarse belt (see USP's exhibits PX 1053, R2984a and PX 1005 at R2896a). While U.S. Plywood stressed that its test of an accused process showed removal of 3½ pounds of wood dust, this must be considered in the light of the fact that it was collected by running a string of 4 foot wide panels 1152 feet long (144 panels each 8 feet long), which is over twice the height of the Washington Monument, and in comparison with 25 pounds of wood removed from the same number of panels by the 6/0 belt. (R2907a).

2134, R3581a, 3589a-90a, 1874a), and the microseal process cannot be practiced on metal because metal cannot be densified. The latter proposition admits and seeks to perpetuate the precise error of law which is at the foundation of the Petition.

Certiorari Should Be Granted

All of U.S. Plywood's arguments in opposition to the granting of the Petition are founded on the errors discussed above in this brief. Its concluding argument that the case does not warrant review again relies on misrepresentations of facts discussed in this brief, it does not face or refute the public interest considerations presented in the Petition, and again, its argument that the "rule" stated in the Question—that a valid patent on a process cannot be avoided simply by varying the details of the apparatus employed in performing the process—does not require restatement by this court, is based on the "supporting" arguments that the apparatus is old. The Brief in Opposition supports the Petition.

Respectfully submitted,

JOHN A. BLAIR,
EVERETT R. CASEY,
700 Fisher Building,
Detroit, Michigan 48202.

ARTHUR F. ROBERT,
Kentucky Home Life Building,
Louisville, Kentucky 40202,
Attorneys for Petitioner,
General Plywood Corporation.

Of Counsel:
HARNESS, DICKEY & PIERCE,
Detroit, Michigan.